91-1843

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

KARL F. GOOS,
Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Karl F. Goos
Pro Se, PETITIONER
R.D. #1 Box 1609
Orwigsburg, PA 17961
(717) 366-1174

February 14, 1992

QUESTIONS PRESENTED

Petitioner's tax returns were audited in 1982 and as a result, deficiencies were assessed for the years 1977 through 1981. Petitoner's tax attorney responded to the 30 day letter of deficiency to the Internal Revenue Service and concluded that for the years 1974 through 1977 petitioner was entitled to a substantial refund and pointed out that errors were made in the 1977 through 1982 tax returns whereby deficiencies and refunds virtually wiped out each other. Since there was no response to petitioner's attorney's letter, Appendix 1, petitioner and his advisors believed that the matter had been settled because the Internal Revenue Service must have figured out that instead of a tax deficiency they would have to refund petitioner some funds; and, therefore, respondent chose

not to litigate this issue further.

Surprisingly, in 1987, five years later, the Internal Revenue Service re-opened the case now claiming that the statute of limitations excluded any corrective action and refunds for years 1974 through 1977 and, therefore, there was only the alleged deficiencies for taxable years 1977 through 1982 to be dealt with. The insurance premiums were inadvertently included in petitioner's tax returns as income. The funds for payment of the insurance premiums were provided by petitioner and his wife by borrowing the cash surrender value on the life insurance policies and then turning over these funds to the corporation. The corporation then paid the insurance premiums out of funds provided by petitioner and his wife to the insurance company, together with other premiums to be paid under

a group life insurance policy for all their employees. Billing to the corporation by the insurance company was done for all parties covered, petitioner as well as his employees; and for this reason, the funds that were provided by petitioner and his wife to cover his premiums were channeled through the corporation.

Question: Why should the Internal Revenue Service let six years of time lapse before continuing to argue a 1982 case when their only motive could have been to deprive petitioner of substantial tax refunds which were still available to petitioner at the time the case was originally argued in 1982?

Why should the Internal Revenue Service be allowed to ignore the fact of returned compensation which is a reduction of income merely because the tax

preparers for petitioner and insurance company at the time did not take into consideration, the return of premiums to the corporation?

Why should the Internal Revenue Service be allowed to address a very restricted legal argument on the matter of whether such funds were paid by the corporation under a "split dollar" agreement when this could only be a side issue and should have no bearing on the fact that the funds for payment of the insurance premiums were actually provided not by the corporation, but ultimately by the petitioner and his wife?

PARTIES IN THE PROCEEDING BELOW

Petitioner, Karl F. Goos, Orwigsburg, Pennsylvania. Gary R. Allen, Esquire, Abraham N.M. Shashy, Jr., Esquire, Curtis C. Pett, Esquire, Charles E. Brookhart, Esquire, Department of Justice, Tax Division, Washington, D.C.

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vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Karl F. Goos, pro se, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App. 51-52) is reported at 91-1518 and 91-1519.

JURISDICTION

The judgment of the Court of Appeals (App. 51-52) was entered on October 17, 1991. The jurisdiction of this Court is invoked pursuant to the appropriate statutes.

STATEMENT OF THE CASE

On March 26, 1982 notice was issued by the office of the District Director, Internal Revenue Service, Philadelphia, PA under reference Ex..R..30 to Karl F. Goos and Wilma V. Goos relating to taxable years 1977, 1978 and 1979; and subsequently such an order was issued for taxable year 1980. After two extensions of time a timely response and written protest to the 30 day letter was sent by our attorney, Mr. Joel Luber, of Frumkin & Manta, Attorneys at Law, Pottsville, PA on June 25, 1982. Subsequently, the case against Wilma V. Goos was dismissed and a stipulation was entered into leaving as the only unsettled issue, the inclusion of insurance premiums paid on the life of Karl F. Goos in the taxable income of Karl F. Goos. All other issues had been settled.

According to the letter written June 25, 1982 by Attorney Joel Luber, the petitioner-taxpayer, Karl F. Goos would have been entitled to a substantial refund for previously, erroneously overpaid income taxes for 1974, 1975, 1976 and 1977 tax years, all still open years for corrective action in 1982. Inadvertently, the insurance premiums were added to the petitioner's income by his tax preparers on erroneous advice given by the insurance broker's office. The insurance broker, at the time had no knowledge that the taxpayer-petitioner and his wife returned to the corporation cash surrender values which were borrowed against the insurance policies; and that the corporation paid annual premiums when such funds were provided to the corporation by taxpayers Karl F. Goos and Wilma V. Goos.

For all practical purposes, when no further activity was initiated by the

Internal Revenue Service, the petitioner and his tax advisors and tax professionals at the time concluded that the matter had been closed and no further action by the Internal Revenue Service was anticipated. However, in 1987 the Internal Revenue Service resumed its efforts to collect what they described as tax deficiencies in the amounts of:

$217,920.47 for 1977
213,112.37 for 1978
222,946.22 for 1979
62,853.80 for 1980.

The Internal Revenue Service then argued in 1988 that the tax years that were still open in 1982 when Attorney Luber responded to the Internal Revenue Service's claim were now no longer open and, therefore, would not be subject to any revision whatsoever. In other words, the Internal Revenue Service let six years lapse before

it responded to an argument that was made in 1982. The Internal Revenue Service then claimed that the tax repayment from prior years, referred to in the 1982 Lube letter, Appendix 1, were lost because by 1988 the Statute of Limitations had run out.

If taxpayer were required to pay the amount of income taxes incorrectly assessed by the Internal Revenue Service, he would have to find:

$87,207.98 in 1977

$73,098.49 in 1978

($ 3,727.55) in 1979

$76,187.81 in 1980

of funds donated to him or otherwise obtained in order to pay taxes which by those amounts, exceed his actual income and take-home pay without making any allowances for living expenses.

When Congress established the auth-

ority for the Internal Revenue Service to collect taxes from the citizens of the United States and wrote the appropriate articles relative to the collection of taxes, at no time did they intend to create a tax burden that would exceed the income of any individual by such staggering amounts of money when the individual had no other source of income except his wages.

What the lawyers of the Internal Revenue Service succeeded to argue in tax court was a narrow issue of whether or not payments for the petitioner's insurance premiums were paid under a "split dollar" agreement. The tax court concluded that payments were not made under a "split dollar" agreement. However, the tax court gave no consideration to the fact that, regardless of whether or not they were "split dollar" policies, the premiums were provided for by the

petitioner and his wife from funds that they obtained from the insurance company by borrowing the cash surrender value of the policies and paying this money to the corporation so that the corporation could pay its annual insurance premiums on their behalf together with the group insurance policy premiums for the other insured employees. The corporation was not in a financial position to come up with the funding of the premium payments itself, and the Internal Revenue Service was fully aware of this fact, because of its extensive audits of the corporation's books and the taxpayer's returns.

The clerk at the office of the insurance company inadvertently provided a letter to the corporation, who also had group pension and life insurance plans with that same insurance company, for all its employees advising that such pre-

miums should be included on W-2 forms of the taxpayer. However, the insurance company's clerk who passed on this information to the taxpayer's tax preparers, were unaware of the return of compensation by the taxpayer-petitioner and, therefore, a mistake was made in the taxpayer's return.

The person in charge for the insurance broker, Murray Popkave, Esquire, with many years of service to the Internal Revenue Service, stated in the United States Tax Court on May 8, 1989 under cross-examination on Page 16, Lines 7 through 23, as follows,

> "A This letter in particular, the December 27, 1978, letter, which is issued -- I can see it's issued with my rubber stamp. I did not personally sign this letter. Information came from

the insurance company as to taxable amounts. My secretary would normally prepare a letter to the clients telling them of what was taxable and what was includable in various parts of their tax returns. In this particular case, the assignments were not taken into consideration. This was simply a mistake in including that other compensation item, because that was the amount that was assigned to the corporation.

Q What assignments are you talking about?

A The other compensation amounts that were listed as "other compensation".

Q There's no reference of assignments here.

A I know. The letter was

developed from information from the insurance company."

In other words, here an attorney in good standing, and, therefore considered an officer of the court, has admitted that his office had made a mistake and that mistake was carried forward; and that he had not seen or examined the letter which was a routine matter handled by clerks who used his rubber stamp signature.

The Internal Revenue Service, on the other hand, has spent many attorneys hours trying to make this mistake stick and had confined its arguments to a very narrow legal issue which the petitioner did not recognize as being important because of lack of legal training. It appears to the petitioner that the attorneys for the Internal Revenue Service should be held to a higher standard because of

their legal training and petitioner considers it grossly unfair and unacceptable under his rights under the Constitution of the United States that attorneys for a government agency should be permitted to unfairly exploit the inexperience of ordinary citizens with a very complicated tax code. The petitioner, therefore, prays that the Supreme Court of the United States either reverses this decision by the United States Tax Court or permits the petitioner a hearing before this court The appeal to the United States Court of Appeals for the Third Circuit agreed with the Tax Court's decision, and apparently was also only focusing on a very narrow legal issue rather than the total aspect of this matter.

REASONS FOR GRANTING THE WRIT

I. The issues presented involve important questions of justice and federal law.

II. The decision below is Incorrect.

A. This Court should settle the question as to why returned compensation should not be treated as a reduction of income.

B. The Internal Revenue Service should not have been allowed to discontinue actions for five open tax years, and then after six years, claim a one-sided expiration of the statute of limitations in its favor disallowing a carry back that would have benefited the taxpayer and wiped out his alleged tax deficiency under timely and equal

application of the law which most likely, would have entitled him to a tax refund.

C. The Court of Appeals for The Third Circuit and the U.S. Tax Court were wrong in limiting the arguments to a mere technical issue as to whether or not the life insurance premiums were provided under a "split dollar" agreement. This technical argument did not address the fact that the premiums were provided by taxpayer and his wife personally, and the corporation only served as a conduit for payment of premiums borrowed by the taxpayer's wife from the cash surrender values of the insurance policies.

CONCLUSION

Petitioner respectfully urges this Court to settle questions unaddressed by the Court of Appeals. It is unthinkable that the Congress of the United States intended at any time to allow the Internal Revenue Service to assess taxes from wage earners that far exceed the wages earned and therefore, put a taxpayer in greatest financial jeopardy.

Petitioner, therefore, prays that Certiorari should be granted to resolve this question of justice and law.

Respectfully submitted,

Karl F. Goos
Petitioner
R.D. #1 Box 1609
Orwigsburg, PA 17961
(717) 366-1174

Date: February 14, 1992

APPENDIX

Page

Letter of Joel Luber, Esquire dated June 25, 1982.....App. 1

U.S. Tax Court, Order to Consolidate, Docket Nos. 12214-87 and 12215-87.....App. 10

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U.S. Court of Appeals for the Third Circuit, Nos. 91-1518 and 91-1519, Sur Petition for Panel Rehearing, dated Nov. 19, 1991..App. 53

Frumkin & Manta

Office of the District Director

June 25, 1982

ISSUE-INCLUSION OF INSURANCE PREMIUMS

Taxpayers Karl and Wilma Goos reported as ordinary income from wages amounts of $217,920.47 in 1977, $213,112.37 in 1978, and $222,946.22 in 1979. These amounts were attributable to payments by Frederic A. Potts & Co., Inc. (Potts") of premiums on insurance policies owned by Wilma Goos on the life of Karl Goos. Originally, these policies were part of a group term life insurance plan adopted by Potts, where the policies used to fund such a plan included whole life policies in the case of Karl and Wilma Goos and term policies on the other included employees.

However, on October 26, 1977, Potts borrowed $5 million from Citibank, N.A.

for corporate purposes. Under the loan agreement, the existing policies on the life of Karl Goos were assigned to Citibank as collateral. The loan has remained outstanding from October 26, 1977 through the present date, when provision was made for its satisfaction. During the entire period, those insurance policies (or other substituted therefor), remained the property of Citibank as security for the loan. At all times in question, the premiums on these policies were paid by Potts (using cash value borrowed from the policies) on or after the time the premiums became due, which was December 1 of each year.

It is the taxpayer's position that, as of October 26, 1977, when the life insurance policies in question were transferred to Citibank, N.A. for the purposes of securing the loan from Citibank to Potts, the policies (i) were being used

by Potts for corporate purposes, (ii) were equitably owned by Potts and (iii) were not being used by Potts as additional remuneration to taxpayers Karl and Wilma Goos. Therefore, from October 26, 1977 forward, any amounts paid by Potts for the policies were for the benefit of Potts and were not compensation to or otherwise reportable as income by either of the taxpayers.

As a general rule, amounts contributed by an employer to the purchase of premiums on an individual life insurance policy, not actually owned by the corporation in which an employee is insured, are taxable to the employee. However, exceptions to this rule exist if the underlying corporate purpose for paying the insurance premiums is not to provide immediate additional compensation or remuneration to the employee. Such an independent corporate purpose has been held to

exist where a corporation pays premiums on policies of insurance on the lives of employees who are stockholder to fund stockholder buy-sell agreements. See Prunier v. Commissioner, 248 F. 2d 818 (1st Cir. 1957) Sanders v. Fox, 253 F. 2d 855 (10th Cir. 1958), Casale v. Commissioner 65. In Prunier v. Commissioner, supra, a landmark case in this area, the corporation paid the premiums on insurance owned by each of its two stockholders and held by it for the purpose of funding a buyout agreement between themselves as to the corporation's shares. The Court stated:

> *** Having in mind the statutory scheme whereby the corporation, J.S. Prunier & Sons, Inc., is dealt with as a separate legal entity and a separate taxable unit, and disregarding the loose sense in which it can be said that a

> benefit to J.S. Prunier & Sons, Inc. is a benefit to its controlling stockholders, it is sufficiently evident that the payment of premiums by corporation in 1950 did not constitute, in that taxable year, reportable income to Henry and Joseph Prunier.*** What will happen when one of the brothers dies is not before us. 253 F. 2d at 820.

Here the corporation, Potts, has in effect secured its own obligation to pay a $5 million debt to Citibank, N.A. by having Wilma Goos make a collateral assignment of the insurance policies in question (four in number) to the bank. Even though "in the loose sense" the payment of the premiums on the assigned policies could be said to be a benefit to the taxpayers as employees or controlling shareholders of Potts, the Prunier case

is ample authority for the rule that the payment of premiums for the corporate purpose of securing a loan to the corporation is not an event which would generate reportable income to such employees or shareholders. In the circumstances here present, Potts has an obligation to repay the $5 million which eventually must be returned to Citibank, N.A., an unrelated third party. In contrast, the corporate payment of the insurance premium supporting the buyout agreement between the shareholders in the Prunier case involved no binding obligation to unrelated third parties. For this reason, the rationaly for excluding the amount attributable to the premiums paid by Potts on the policies assigned to Citibank, N.A. from the income of taxpayers Karl Goos and Wilma Goos is even stronger than that of the shareholders in the Prunier case. The holding in the Prunier case

was approved by the Internal Revenue Service in Rev. Rul. 59-184, 1959-1 C.B. 65. Accord. Peerless Pattern Co, 29 B.T.A. 767 (1934) and cases cited therein. Hence, the taxable incomes of Karl and Wilma Goos for the years 1977 through 1979 should be recomputed to exclude the amounts attributed to insurance purchased by Potts ($217,920.57 in 1977; $213,112.33 in 1978; and $222,946.22 in 1979) in each of those years.

CONCLUSION

For the reasons set forth above, the taxpayers respectfully submit this Protest to the 30-day letter based on the revenue agent's report and respectfully contend that they are owed a refund of $95,841.18, with respect to income taxes erroneously paid with their 1979 federal income tax return, plus interest.

In addition, the taxpayer may be owed refunds based on a carryback of net operating losses generated in 1977 (still an open year) to taxable years 1974, 1975 and 1976, plus interest. These amounts have not yet been calculated by the taxpayers of their representatives.

If taxpayers' assertion is unpersuasive that new Regulation §1.612-3(b (3) is either invalid or inapplicable to this transaction because of its failure to be adopted in conformity with the Administra Procedure Act, then taxpayers will concede an increase in income taxes of roughly $30,000.00 in 1977 and roughly $3,000.00 for 1978, but taxpayers contend that they should be allowed a refund of roughly $90,000.00 of income taxes for 1979.

The foregoing protest and accompanying documents were prepared by the undersigned except as otherwise indicated.

BEST AVAI

While the preparers are informed and believe that the statements of fact herein are true and correct, it cannot be represented that these facts are a matter of personal knowledge.

Respectfully submitted,

FRUMKIN & MANTA

By: _____

Joel S. Luber

JSL

LABLE COPY

App. 10

UNITED STATES TAX COURT

WASHINGTON, D.C. 20217

KARL F. GOOS	)	
Petitioner,	)	
V.	)	Docket No.
COMMISSIONER OF	)	12214-87
INTERNAL REVENUE	)	12215-87
Respondent.	)	

ORDER

For cause, it is

ORDERED that these cases are consolidated for trial briefing, and opinion nunc pro tunc as of May 8, 1989.

(Signed) Thomas B. Wells

Thomas B. Wells

Judge

Dated: Washington, D.C.

April 2, 1991

App. 11

UNITED STATES TAX COURT

Washington, D.C. 20217

KARL F. GOOS)

Petitioner,) Docket No.

V.) 12215-87

COMMISSIONER OF)

INTERNAL REVENUE)

Respondent,)

DECISION

Pursuant to the opinion of the Court as set forth in T.C. Memo. 1991-146, filed April 2, 1991, it is

ORDERED and DECIDED that there are deficiencies in petitioner's Federal income taxes as follows:

Year	Deficiency	Additions to Tax Under Section 6653(a)
1977	$180,719.79	$9.035.99
1978	171,082.66	8,554.13
1979	95,702.95	4,785.15

Thomas B. Wells

Judge

Entered APR 4, 1991

App. 12

UNITED STATES TAX COURT

Washington, D.C. 20217

KARL F. GOOS)

Petitioner,) Docket No.

V.) 12214-87

COMMISSIONER OF)

INTERNAL REVENUE)

Respondent.)

DECISION

Pursuant to the opinion of the Court as set forth in T.C. Memo. 1991-146, filed April 2, 1991, it is

ORDERED and DECIDED that there is a deficiency in petitioner's 1980 Federal income tax in the amount of $100,131.37 and an addition to tax under section 6653(a) in the amount of $5,006.57.

Thomas B. Wells

Judge

Entered: APR 4 1991

T.C. Memo. 1991-146

UNITED STATES TAX COURT

KARL F. GOOS, Petitioner v.

COMMISSIONER OF INTERNAL

REVENUE, Respondent

Docket Nos. 12214-87, 12215-87.

Filed April 2, 1991.

Karl F. Goos, pro se.

Russell Stewart, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

WELLS, Judge: In the instant consolidated cases (hereinafter referred to as the instant case), respondent determined the following deficiencies in and additions to petitioner's Federal income taxes:

Year	Deficiency	Addition to Tax Under Section 6653(a)[1]
1977	$180,719.79	$9.035.99
1978	171,082.66	8,554.13
1979	95,702.93	4,785.15
1980	100,131.37	5,006.57

After concessions, the issues remaining for us to decide are (1) whether petitioner may exclude from his income amounts which he claims were nontaxable "split dollar" premiums paid by his wholly owned corporation with respect to life insurance covering petitioner's life; and (2) whether petitioner is precluded

---

1. Unless otherwise indicated, all section references are to the Internal Revenue Code as amended and in effect during the years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

from asserting the exclusion of such premiums from his income because of a "duty of consistency" or "quasi estoppel."

FINDINGS OF FACT

Some of the facts have been stipulated for trial pursuant to Rule 91. The stipulations and accompanying exhibits are incorporated in this Opinion by reference. The stipulations settled all issues raised by respondent's notices of deficiency in the instant case.

Petitioner resided in Orwigsburg, Pennsylvania, at the time he filed the petitions in the instant case.

During the years in issue, petitioner was the president and principal executive officer of Frederick A. Potts & Co. (Potts & Co.), a corporation owned solely by petitioner. Potts & Co. was involved in the sale and export of coal and coal byproducts. In 1977, petitioner personally borrowed $5,000,000 from Citibank, N.A. (Citibank) and, in turn, lent the

proceeds of the loan to Potts & Co. To secure the loan it received from petitioner, Potts & Co. gave petitioner a mortgage on certain real estate it owned. Petitioner assigned the mortgage to Citibank as additional collateral for the loan. During the years in issue, four whole life insurance policies issued by National Home Life Assurance Company (the whole life policies) in the total approximate amount of $9,000,000 insuring petitioner's life were in force and owned by petitioner's spouse, Wilma Goos. As additional collateral for the Citibank loan, petitioner and his spouse assigned the whole life policies to Citibank.

In his petitions, petitioner claimed that he erroneously reported as income, for the years in issue, life insurance policy premiums (hereinafter referred to as the premiums) paid by Potts & Co. in the following amounts:

Year	Amount of Premiums
1977	$217,920.47
1978	213,112.37
1979	222,946.22
1980	62,853.80

The premiums represented payments for life insurance covering petitioner's life. Potts & Co. paid the premiums partially in cash and partially by policy loans against the cash surrender value of the whole life policies.

Potts & Co. received correspondence from Nathan S. Kolbes Associates, Inc. (Kolbes), its insurance broker, advising Potts & Co. to include the premiums on petitioner's W-2 forms as income to petitioner.

For the respective taxable years in issue, petitioner received W-2 forms from Potts & Co. which included the premiums as "income or other taxable compensation" to petitioner. For the years in issue, Potts & Co. deducted the premiums on

its corporate tax returns.

OPINION

As stated above, all of the issues arising out of respondent's notice of deficiency have been settled. In his petitions, however, petitioner claims that he erroneously included in his incom the premiums paid by Potts & Co. with respect to life insurance on his life. Petitioner has the burden of proving that such amounts should be excluded from his income. Rule 142(a).

Petitioner contends that the premium were paid with respect to life insurance policies that were subject to a "split dollar" arrangement between Potts & Co. and petitioner's spouse, and therefore the payment of the premiums by Potts & Co. should be excluded from his income.

"Split dollar" is a term generally used to describe various arrangements between employers and employees for shar-

ing the cost of premiums for insurance covering the employee's life. Under a split dollar arrangement, the employer is entitled to receive out of the policy proceeds the "investment element," consisting of the greater of the cash surrender value or the amount of premiums it has paid, and the employee's (or owner's) beneficiary is entitled to receive the balance, of "risk element." Johnson v. Commissioner, 74 T.C. 1316,1322 (1980).

In the instant case, respondent primarily contends that petitioner has failed to prove the existence of any split dollar arrangement. We agree.

The evidence shows that Potts & Co. did not treat the payment of the premiums in issue as if they were connected with a split dollar arrangement. Petitioner received from Potts & Co. a form W-2 which included the premiums

in his income as compensation. Potts & Co.'s corporate returns for the years in issue reflect a deduction for petitioner's compensation equal to the amounts shown on the W-2 forms. Kolbes advised Potts & Co. in writing each such year to include the premiums in petitioner's taxable income. Those letters made no reference to the existence of any split dollar arrangement. Petitioner, however, now contends that such treatment was in error.

In order for a split dollar insurance arrangement to exist, the employer and employee must designate their respective rights to receive the policy proceeds. There are two normally accepted methods of entering into such an arrangement. Under the so-called "endorsement" method, the employer is the owner, and the insurance company endorses the policy with the details of the "split" of the right to

the death proceeds between the employer and the beneficiary. Under the so-called "collateral assignment" method, the owner of the policy (i.e., the insured or some other person or entity) assigns the policy to the employer as collateral for the "split" arrangement as to the death proceeds. See Sercl v. United States, 684 F. 2d 597,598 n.1 (8th Cir. 1982); Rev. Rul. 64-328, 1964-2 C.B. 11, 12. Under either method, on the death of the insured employee, the proceeds of the policy are split between the employer, to the extent of the investment element and the beneficiary, to the extent of the remainder.

No documents evidencing an endorsement or collateral assignment of the life insurance policies for the years in issue, however, were offered at trial. Moreover, because petitioner does not claim that Potts & Co. owned the whole life policies, the existence of a split dollar arrange-

ment cannot be established under the endorsement method. Nevertheless, petitioner attempts to show that such arrangement existed under the collateral assignment method by means of a copy of a letter attached to petitioner's brief. The letter, dated February 20, 1980, from Kolbes to Potts & Co., was not offered as evidence at trial and is therefore not a part of the record. In any case, the letter refers to a "Split Dollar Agreement Collateral Assignment Form" that apparently was to be signed at a time subsequent to the years in issue and also refers to a "new U.S. Life policy." The letter does not refer to the whole life policies issued by National Home Life Assurance Company or any other policies in effect during the years in issue. Also attached to petitioner's brief is a copy of a pleading apparently filed during 1981 in the Montgomery

County Pennsylvania Court of Common Pleas, which asserts the existence of a "Split Dollar Agreement, Collateral Assignment" that obligates Potts & Co. to make payments of premiums on certain policies. The pleading does not refer to any time period and was offered at trial. Petitioner explains neither the letter no the pleading in his brief, and respondent objects to their admission as evidence.

The record clearly establishes that the whole life policies were assigned to Citibank as collateral for a loan. Under that arrangement, Citibank would have had the right to receive all of the death proceeds. The form utilized to assign the life insurance to Citibank as collateral for the loan was signed by petitioner as insured and petitioner's spouse as owner and beneficiary. The form did not mention any collateral assignment and did not contain any assent by

Potts & Co. to the assignment of the insurance to Citibank as collateral for the loan. Thus, under the documented arrangement during the years in issue, upon the death of petitioner, to the extent the death proceeds of insurance exceeded the outstanding balance of the Citibank loan, the bank would have had to pay such excess over to the record owner and beneficiary, petitioner's spouse. There is no documented arrangement during the years in issue under which Potts & Co. would have been entitled to any of the insurance proceeds.

Petitioner offers the testimony of Murray Popkave, an employee of Kolbes during the years in issue, to prove the existence of the asserted split dollar arrangement. Mr. Popkave, however, admitted that he knew little about "split dollar" life insurance arrangements during the years in issue. His assertion that

a "split dollar" arrangement existed during the years in issue therefore must have been made pursuant to his current understanding of such arrangements, rather than his unaided recollections. The letters sent to Potts & Co. by Kolbes during the years in issue advising Potts & Co. to include the premiums in petitioner's W-2 forms as income were signed by Mr. Popkave and make no reference to any split dollar arrangement. Furthermore, in his testimony, Mr. Popkave gave neither the details of the asserted split dollar arrangement nor the specific years in which such an arrangement existed.

It appears, from the bits of the confused record that we can piece together, that the scenario posited by respondent is the more likely one, namely, that a split dollar arrangement might have been entered into after the years in issue with respect to a policy with U.S.

Life, but that during the years in issue the only assignment of life insurance that existed was the assignment to Citibank of the whole life policies issued by National Home Life Assurance Company.

Considering the lack of evidence in the instant case and considering petitioner's burden of proof, we are unable to conclude that a split dollar arrangement existed during the years in issue with respect to any life insurance covering petitioner's life. We therefore hold that petitioner has failed to prove that the premium payments paid by Potts & Co. with respect to insurance covering petitioner's life were improperly included in petitioner's income during the years in issue.

Our holding dispenses with the need to address the issue of whether petitioner should be precluded by the doctrines of "duty of consistency" or "quasi estoppel

from asserting that the premiums were not income to petitioner. We nevertheless note that such defenses are affirmative defenses which must be, but were not, affirmatively pleaded. Arkansas Best Corp. v. Commissioner, 83 T.C. 640, 660 n.8 (1984), affd. in part and revd. in part on other issues 800 F.2d 215 (8th Cir. 1986), affd. 485 U.S. 212 (1988); Rule 39. To reflect the foregoing,

Decision will be entered for the respondent.

App. 28

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 91-1518

NO. 91-1519

KARL F. GOOS, Appellant

v.

COMMISSIONER OF INTERNAL

REVENUE SERVICE, Appellee

BRIEF FOR APPELLANT

Appeals from the judgment of the United States Tax Court, Washington, D.C. 20217, entered by Judge Thomas B. Wells, Docket No. 12214-87 and 12215-87 on April 4, 1991.

_____

Karl F. Goos, Appellant

Dated: July 30, 1991

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STATEMENT OF THE CASE

AND ARGUMENT

This is an action brought before the United States Court of Appeals for the Third Circuit, Room 214000, United States Courthouse, 601 Market Street, Independence Mall, West, Philadelphia, PA 19106-1790.

On April 2, 1991 Judge Wells issued a Finding in KARL F. GOOS, pro se., Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent, Docket Nos. 12214-87, 12215-87.

On page three of Judge Wells's Findings of Fact and Opinion, the last sentence states as follows, "Potts & Co. paid the premiums partially by cash and partially by policy loans against the cash surrender value of the whole life policies." That conclusion is incorrect. Potts & Co. paid the premiums totally in cash. The

policy loans were taken by the owner of the policy, Wilma V. Goos; and could not have been taken by the company because the company was not the owner. Wilma Goos then turned over the proceeds of those policy loans to the company as partial or total repayment of the compensation received by Karl Goos by the payment of the premiums. If it were determined that Potts & Co. had taken the loans diectly, then the amount of the compensation to be charged to him would have been reuced by the loan because the net outlay of the company would have been less anyway. One cannot charge the appellant with compensation for outlays which were not made by the company, F.A. Potts.

On page four of Judge Wells's Findings, he stated, "Potts & Co. received correspondence from Nathan S. Kolbes & Associates, Inc. (Kolbes), its insur-

ance broker, advising Potts & Co. to include the premiums on petitioner's W-2 forms as income to petitioner.

For the respective taxable years in issue, petitioner received W-2 forms from Potts & Co. which included the premiums as "income or other taxable compensation" to petitioner. For the years in issue, Potts & Co. deducted the premiums on its corporate tax returns.

The insurance broker was obviously unaware that this cash for payment was supplied by Wilma Goos and Karl Goos and not by the corporation; and, therefore, he apparently did not question the W-2 amounts which were included as income to petitioner; and, furthermore, as Mr. Popkave stated in this testimony before the Court, Transcript May 18, 1991, Page 16, Lines 5 thought 17, this was simply a mistake; these letters were issued by

his secretary over his rubber-stamped signature and he did not necessarily see them. Furthermore, the insurance broker, Kolbes, had no knowledge of any bookkeeping that occurred afterwards and, therefore, could not advise Potts or the appellant of any adjustments which should have been made to taxable compensation. In his opinion, Judge Wells agrees with the Commissioner that in the instant case, the petitioner has failed to prove the existence of any split-dollar arrangement. It is correct that the appellant was unable to locate any contracts that were originally issued back in 1974 because of the lapse of time and the fact that the insurance broker went out of business in 1981. However, the witness, Attorney Murray Popkave, stated in his testimony, Transcript May 18, 1991, Page 18, Lines 2 through 6, that he saw a signed split-

dollar agreement. However, he was also unable to locate it because of the enormous time lapse. Even if there would not have been a split-dollar plan in the traditional sense, the benefits of these policies were totally received by Potts & Co. in that all cash available in the policies were paid to Potts; and no dollar value was retained by the owner of the policies, Mrs. Goos, and the death benefit was assigned for obligations essentially of Potts & Co.

An analysis of loans taken on these policies, together with checks written directly by Wilma V. Goos and Karl F. Goos to Potts & Co. indicate that a total of $1,007,929.27 was paid to F.A. Potts between March 21, 1977 and April 29, 1980. These amounts included all the loan proceeds received by Mrs. Goos through the annual policy loans and additional amounts

were paid from personal funds. These amounts of returned compensation should be treated as reduction of the income previously included in appellant's income. The Internal Revenue Service was aware of the cash repayments and of the policy loans because they audited and examined the books and records of the corporation at the same time they audited the appellant's tax returns. The total income included in 1977, 1978 and 1979 from the insurance premiums paid by F.A. Potts was exceeded by the amounts paid by Karl F. Goos and Wilma V. Goos to F.A. Potts. In other words, not only were the amounts charged as compensation returned to the company by the appellant and his wife, but the Internal Revenue Service, through their annual examination of the tax returns of F.A. Potts and Karl Goos were well aware of the fact and chose to ignore

it. An effective examination would have exposed the error that was made and the error could have been corrected in time. In fact, in response to the Internal Revenue Service's Notice of Deficiency which was issued in 1982, the tax attorneys of the appellant in their response to 30 day Notice of Tax Deficiency, concluded in their arguments, Exhibit P-1, that the error needs to be corrected and as a result, there would have been a tax adjustment made. Such a correction would also include prior years which at that time were still open; and such a corrective action would have resulted in a substantial refund of taxes paid by the appellant. However, the Internal Revenue Service, after receipt of response to their 30 days notice, chose to be silent until many years thereafter; in fact, until

a time when they asserted that the statute of limitations would now no longer allow them to take any corrective action in either Potts's or Karl Goos's return.

The Internal Revenue Service's inaction for all those year resulted in great harm to the appellant in that he retained no cash benefit from the amounts being charged as compensation and is now, after all these years, being asked to pay taxes on many thousands of dollars he never received. The Internal Revenue Service knew, from their examination of Potts's books and records which they examined at the time that in virtually every instance, within a matter of days, the premiums were paid by F.A. Potts on the insurance policies in question, the cash value loans were taken by Mrs. Goos and those dollars available were deposited in the F.A. Potts account. In addition

to that, additional dollars from personal assets of Mr. and Mrs. Goos were deposited in the F.A. Potts account, cancelling all of the compensation reported for life insurance benefits on W-2 forms. The Internal Revenue Service knew this during the scope of their examination and through the correspondence and discussions with the appellant's attorneys and were silent on this matter for many years after receiving this documentation. It was very difficult, many years later, to obtain the physical proof of records long ago thought irrelevant due to the inaction of the Internal Revenue Service; then, suddenly, having to defend something that appellant thought was concluded many years before.

The insurance agency of Nathan S. Kolbes and Associates, Inc., went out of business in 1981 and records were very scarce thereafter in order to reconstruct

what had occurred during those years. The appellant did the best he could in obtaining what information he could, in obtaining the personal testimony of Attorney Murray Popkave, who was employed by the insurance broker during the time period in question as to his recollection of what occurred many years prior. But, the Internal Revenue Service knew many years before what had occurred and should not have been permitted to wait until records were lost or destroyed or became otherwise obsolete and then make charges which could not be adequately defended. The Internal Revenue Service had available to it during those early years, 1977 through 1982, all of the proof of the truth of the appellant's argument.

The conclusion to this argument is basically this, none of the benefits of these policies received, were retained

by the appellant. All cash benefits were obtained by F.A Potts and Co., Inc. and it would be totally unfair to charge the appellant with income which was immediately returned to his company. This fact was well known to the Internal Revenue Service at all times The Internal Revenue Service's argument on side issues such as split dollar. legal documents from 1974 evidencing assignments not being produced, are irrelevant to the facts of the case. It is absolutely true, and the Internal Revenue Service always knew this, that the cash proceeds were returned to F.A. Potts, which must be compelling evidence that the benefits under the insurance policies were assigned to F.A. Potts.

Under Section 105 of the Internal Revenue Code, compensation as paid by corporations to its employees is taxable to the individual and is deductible as an ordinary and necessary business expense

by the corporation. It is also well established that in the case of excess compensation being determined by the Internal Revenue Service in payment to a corporate employee, that the repayment of said excess compensation would result in a reduction of the taxable income to the employee, and of course, a reduction of the deduction under ordinary and necessary business expense by the corporation. In a like manner, this compensation received by the appellant was repaid by Wilma V. Goos, the owner of the policies and the appellant did not retain any benefits of that compensation.

It is the appellant's opinion that the Internal Revenue Service should not have been allowed to basically deactivate this tax case from 1982 until 1987 and then come back and rehash an old argument from many years before, on which they

had all the records, and which leaves the appellant with a situation where he does not have the benefit of all these records because his corporation and he personally, have been in Chapter XI bankruptcy since 1981 and attorneys and accountants of various firms have gone through and rifled the files of the corporation for their own benefits. There is no doubt in the appellant's mind that the Internal Revenue Service was well aware of all these facts because of correspondence with his attorneys in 1982 and is now basically playing dumb in order to assess a large tax liability in an improper manner, also citing now statute of limitation which would preclude corrective actions on the tax returns of Potts, as well as appellant. They have misled Judge Wells by enumerating bits and pieces of incomplete documentation

and arguments that because the appellant no longer has complete and detailed records of events that date back 14 and 15 years, when the life insurance policies were first entered into, he must be hiding something or he must be holding back information that would prove the Internal Revenue Service's case.

Judge Wells in page eight of his Opinion stated, "It appears, from the bits of the confused record that we can piece together, that the scenario posited by respondent is the more likely one, namely, that a split dollar arrangement might have been entered into after the years in issue with respect to a policy with U.S. Life, but that during the years in issue the only assignment of life insurance that existed was the assignment to Citibank of the whole life policies issued by National Home Life Assurance

Company." This proves precisely the appellant's point that the case should have been argued or continued to be argued in 1982 when a complete record was available; and furthermore, Judge Wells was not informed by the Internal Revenue Service in spite of their "careful and complete" audits that the petitioner returned all of the monies that were paid for insurance premiums by the corporation.

No one can be expected to pay income tax on funds that he or she did not receive and this is exactly and precisely the issue here. The appellant prays that the Third Circuit Court of Appeals reverses the decision of Judge Wells filed and entered on April 2, 1991 in the referenced tax matter.

Respectfully,

Karl Goos

Appellant

App. 45

IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 91-1518

NO. 91-1519

KARL F. GOOS, Petitioner-

Appellant

v.

COMMISSIONER OF INTERNAL

REVENUE SERVICE, Appellee

PETITION FOR REHEARING

BEFORE THE ORIGINAL PANEL

Appeals from the judgment of the United States Tax Court, Washington, D.C. 20217, entered by Judge Thomas B. Wells, Docket No. 12214-87 and 12215-87 on April 4, 1991.

_____

Karl F. Goos

Petitioner-Appellant

Dated: July 30, 1991

Gary R. Allen, Esq.

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Petition for Rehearing

Before the Original Panel

Petitioner-Appellant is herewith filing for rehearing before the original panel on the grounds that the original panel had not been given full details about the Appellant's return of premiums paid to the company and that such return of premiums actually provided the cash for the corporation to pay the insurance company.

This fact was known to the Internal Revenue Service through these proceedings because of its comprehensive audits of the corporation's records but the Internal Revenue Service withheld that record and those findings in its testimony, from the Courts and Petitioner-Appellant. Instead, the Internal Revenue Service built a legal argument about the legalities of a split-dollar insurance policy for

which Petitioner-Appellant could not produce all the necessary documents to prove his case. Because of the expiration of time, 1974 versus 1989, Petitioner-Appellant was unable to obtain complete records. His efforts were additionally hampered by the fact that the insurance agent went out of business sometime in the late 1970's; and the only records available were those personally retained by a former employee of that insurance company, Attorney Murray Popkave. Attorney Popkave then appeared as a witness in this matter, however, he was not informed prior to his appearance as a witness about the legal positions and the arguments of the parties; and, therefore, did not have the opportunity to prepare himself for his testimony.

Petitioner-Appellant herewith requests that he be permitted to re-argue

his case before the original panel in order to bring out all pertinent facts such as proof of return of the premiums which had been known to the Internal Revenue Service for all these years, but were not brought out during the original hearing. Petitioner-Appellant, not being an attorney and not being trained in the legal profession, had no way to assess the weight of such evidence.

Petitioner-Appellant always believed and still believes that one cannot be charged with taxes on income never received or income which was returned to the source from which it originated; and particularly when such taxes exceed the entire total income of the individual being taxed. In addition, in this instance, because of this payment made to the corporation, there were no incidental death benefits received by Petitioner-Appellant or his

wife from the corporation, because payment fo
the insurance coverage was entirely paid
for by Petitioner-Appellant or his wife.
Therefore, Petitioner-Appellant respectfully
requests a rehearing on these matters.

_____

Karl Goos

Petitioner-Appellant

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NO. 91-1518 AND 91-1519

KARL F. GOOS,

Appellant

v.

COMMISSIONER OF INTERNAL

REVENUE SERVICE

Appeal from the United States

Tax Court, Washington, DC

Tax Court No. 12214-87 and 12215-87

(Honorable Thomas G. Wells)

Submitted Under Third Circuit Rule

October 4, 1991

Before: BECKER, ALITO and GARTH,

Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it appearing that the findings of the Tax Court that taxpayer failed to prove that the

premiums were paid under a split dollar arrangement was not clearly erroneous, it is

ADJUDGED AND ORDERED that the decision of the Tax Court be and is hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT,

_____

Circuit Judge

Attest:

_____

Sally Mrvos, Clerk

Dated: October 17, 1991

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

NOS. 91-1518 AND 91-1519

KARL F. GOOS,

Appellant

v.

COMMISSIONER OF INTERNAL

REVENUE SERVICE

(Tax Court No. 12214-87 and 12215-87)

SUR PETITION FOR PANEL REHEARING

Present: BECKER and ALITO, Circuit Judges,

and GARTH, Senior Circuit Judge

The petition for rehearing filed by appellant having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is DENIED.

BY THE COURT:

_____

Circuit Judge

DATED: Nov 19 1991